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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7

8 YOLANDA MITCHELL,

No C 04-3135 VRW

No C 04-3301 VRW

9 Plaintiff,

ORDER

10 v

11 SUPERIOR COURT OF CALIFORNIA,
12 COUNTY OF SAN MATEO, a judicial
branch entity,

13 Defendant.
14

15 IRMA TOLENTINO,

16 Plaintiff,
17

18 v

19 SUPERIOR COURT OF CALIFORNIA,
20 COUNTY OF SAN MATEO, a judicial
branch entity

21 Defendant.
22

23 Defendant Superior Court of the State of California in
24 and for the County of San Mateo (Superior Court) has moved for
25 attorney fees in this Title VII case pursuant to 42 USC § 2000e-5(k)
26 following the court's June 7, 2007 entry of summary judgment in
27 favor of Superior Court and against plaintiffs Irma Tolentino and
28 Yolanda Mitchell. C 04-3135 Doc #70.

1 Superior Court has resolved its fee motion with plaintiff
2 Tolentino (C 04-3135 Doc #88 at 2) through settlement, leaving for
3 the court's resolution only Superior Court's motion for attorney
4 fees against plaintiff Mitchell.

5 For the reasons stated herein, the court GRANTS Superior
6 Court's motion for attorney fees.

7
8 I

9 A

10 The court's summary judgment order described in detail the
11 unified factual chronology of the Mitchell and Tolentino cases.
12 C 04-3135 Doc #70 at 5-16. Additionally, the order discussed and
13 applied the standards for successfully opposing a motion for summary
14 judgment in a case alleging discrimination under Title VII (id at
15 18-21), retaliation (id at 21-22), defamation (id at 22) and
16 intentional infliction of emotional distress (id at 23-24). Finding
17 that neither plaintiff had adduced evidence sufficient to establish
18 a prima facie case of discrimination or retaliation or to oppose
19 summary judgment on any of their other claim, the court ordered
20 judgment entered in favor of Superior Court. The court noted that
21 "Superior Court's evidence of legitimate personnel management
22 activity is extraordinarily strong," and that "much of Superior
23 Court's evidence was in plaintiffs' hands before these lawsuits were
24 filed and [] the discovery process added little to support
25 plaintiffs' view of these terminations." Accordingly, the court
26 observed that the case might be an appropriate one for an award of
27 fees and costs under 42 USC § 2000e-5(k). Id at 43.

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B

Prior to filing the instant motion for attorney fees, counsel for Superior Court requested from Mitchell's counsel, William Hopkins, a one-week extension of the deadline established by Civil Local Rule 54-6 to file its motion for attorney fees and its bill of costs. C 04-3135 Doc #73 at 1-2. After leaving a voice mail message for Hopkins requesting the extension, Superior Court's counsel received a letter via facsimile denying the request. Id Ex A at 2. Accordingly, Superior Court's counsel then filed an ex parte application seeking the one-week extension, which the court granted. C 04-3135 Doc ## 72, 76. Superior Court then timely filed the instant motion for attorney fees. C 04-3135 Doc #77.

Superior Court argues that because it prevailed on summary judgment and because Mitchell's claims were unreasonable and without foundation, Superior Court is entitled to reasonable attorney fees under 42 USC § 2000e-5(k). C 04-3135 Doc #77 at 2. Superior Court asserts the following in support: (1) Mitchell's lawsuit against Superior Court contained unreasonable and unsupportable claims (C 04-3135 Doc #77 at 4); (2) Mitchell had access to the evidence upon which Superior Court based its termination decisions before filing the lawsuit (id at 5); (3) Superior Court attempted, but failed, to resolve the case through mediation and at a settlement conference (id at 5); and (4) because the court determined that Mitchell had failed to establish a prima facie case and, moreover, could not overcome Superior Court's evidence establishing legitimate, non-discriminatory reasons for firing Mitchell. Id.

Superior Court filed a fee request based on the lodestar method of fee calculation, consisting of reasonably expended hours

multiplied by a reasonable hourly rate. C 04-3135 Doc #77 at 11;
See Hensley v Eckerhart, 461 US 424, 433 (1983). The lodestar
method is appropriate for determining reasonable fees under 42 USC §
2000e-5k and is "the guiding light of our fee-shifting
jurisprudence." Gisbrecht v Barnhart, 535 US 789, 801-02 (2002),
quoting Burlington v Dague, 505 US 557, 562 (1992).

Superior Court's motion requests \$99,934.75 in fees broken
down as follows:

Year	Fees for Mitchell case only	Joint undifferentiated fees for both Mitchell and Tolentino cases
2004	-	19,557.00
2005	\$31,303.50	89,626.00
2006	\$3,722.00	11,992.50
2007	-	8,643.00
SUBTOTAL	35,025.50	129,818.50
1/2 of joint subtotal		64,909.25
GRAND TOTAL = Mitchell case subtotal plus ½ of joint subtotal	\$99,934.75	

C 04-3135 Doc #79 Ex C. These figures reflect a billing rate of
\$205 per hour for all attorney hours billed through June 30, 2006
and a rate of \$215 per hour for hours billed after June 20, 2006.

C 04-3135 Doc #79 at 3 ¶ 7. Much of the amount claimed represents
Superior Court's counsel's time spent on claims related to both the
Tolentino and Mitchell jointly, of which Superior Court seeks half
from Mitchell, while the remainder represents hours devoted to the
Mitchell case alone. Id at ¶ 8. Superior Court's counsel asserts
that both the Mitchell and Tolentino cases "stemmed from a common
nucleus of operative fact and involved the same witnesses,"

1 warranting joint timekeeping. The court finds this approach
2 reasonable and that any further attempt to disaggregate time spent
3 on the Mitchell and Tolentino cases is unlikely to produce a more
4 accurate allocation.

5 Superior Court submits declarations detailing the
6 experience and billing rates of Superior Court's counsel (C 04-3135
7 Doc #79) together with two declarations from other attorneys in the
8 community knowledgeable about defense costs in employment litigation
9 stating that the requested billing rates of \$205 and \$215 per hour
10 are not only reasonable but low. C 04-03135 Doc #80 at 2 ¶¶ 3-4;
11 Doc #81 at 2 ¶ 3.

12 The court finds both the billing rates and the number of
13 hours claimed reasonable and approves the lodestar figure.

14
15 C

16 Mitchell failed to file timely opposition to the motion
17 for attorney fees. Then, ten days after the August 9, 2007 deadline
18 — apparently prompted by Superior Court's reply brief pointing out
19 Mitchell's failure to oppose — the court received an "initial
20 opposition" from Mitchell (C 04-3135 Doc #91) along with requests
21 for relief from late filing, for leave to submit supplemental late
22 briefing and for continuance of the hearing date. C 04-3135 Doc
23 #92. In a supporting declaration, Hopkins proffered a number of
24 excuses. Id. In particular, Hopkins stated:

25 That I have recently relocated my office. Coupled with
26 my efforts to change office locations, also to place
27 closed matters in storage, and also coordinate
28 arrangements to take my children to visit family on the
east coast while they were out of school for the
summer, I had attempted to coordinate continuances and
rescheduling of matters. Unfortunately, I had
neglected to properly calendar this matter during this

1 period, as I had thought that I had sought continuances
2 where possible and rescheduled, accordingly.

3 * * *

4 I am submitting the current opposition (filed
5 concurrently), but based on the request for relief made
6 herein, respectfully ask that this matter be continued
so as to allow Plaintiff to file a further opposition,
particularly if the Court is inclined to grant fees and
/or "not" [sic] stay this matter pending the resolution
of the appeal. .[sic]

7 Id at 2 ¶¶ 1, 4.

8 In addition to being filed late and admittedly
9 insufficient, the opposition brief essentially admitted that
10 Mitchell had lacked a prima facie case of discrimination or
11 retaliation. The opposition states:

12 Awarding Attorney's fees against plaintiffs that
13 aren't able to meet th[e] very difficult burden of
14 essentially establishing something that only exists
15 in the mind of the employer * * * particularly where
16 the action is not frivolous or brought in bad faith,
17 would have a chilling affect [sic] on discrimination
and retaliation claims. A conclusion that
discriminatory or retaliatory intent has not been
shown does not invariably establish that the action
is frivolous or brought in bad faith.

18 C 04-3135 Doc #91 at 2.

19 In response, Superior Court filed a timely surreply on
20 August 21, 2007 in which it asked the court to deny Mitchell's
21 requests based on the following points: Mitchell's opposition
22 response was ten days late; Superior Court attempted, via letter of
23 June 25, 2007, to meet and confer about the attorney fees, but
24 Hopkins never responded to the letter; and Hopkins had known about
25 Superior Court's motion for nine weeks, so his failure to comply
26 with the local rules weighed against allowing additional time. Id.
27 C 04-3135 Doc #93 at 2-3.

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A

13 "A district court may in its discretion award attorney's
14 fees to a prevailing defendant in a Title VII case upon a finding
15 that the plaintiff's action is frivolous, unreasonable, or without
16 foundation, even though not brought in subjective bad faith" or
17 "that the plaintiff continued to litigate after it clearly became
18 so." *Id.* at 421-22. The legislative history of this provision
19 establishes that Congress wanted to "protect defendants from
20 burdensome litigation having no legal or factual basis," *id.* at 420,
21 and the Supreme Court specifically noted that "many defendants in
22 Title VII claims are small- and moderate-size employers for whom the
23 expense of defending even a frivolous claim may become a strong
24 disincentive to the exercise of their legal rights," an "equitable
25 consideration" with which courts should be concerned in adjudicating
26 Title VII cases. *Id.* at 423 n20.

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1 to the countervailing public policy favoring vigorous enforcement of
2 Title VII. The Ninth Circuit has stated that "a district court must
3 exercise caution in awarding fees to a prevailing defendant in order
4 to avoid discouraging legitimate suits that may not be 'airtight,'"
5 while taking into account the financial burden to employers as noted
6 in Christiansburg. EEOC v Bruno's Restaurant, 13 F3d 285, 287-88
7 (9th Cir 1993). Indeed, Mitchell's only argument in opposition to
8 the motion is that awarding attorney fees against her "would have a
9 chilling affect [sic] on discrimination and retaliation claims" (C
10 04-3135 Doc #91 at 2). Accordingly, the court must balance the
11 competing equitable factors in adjudicating the instant motion.
12

13 B

14 First, the court considers whether Mitchell's suit was
15 "frivolous, unreasonable, or without foundation," a determination
16 that is subject to a variety of considerations including: the
17 plaintiff's failure to produce any evidence; a prior adverse
18 decision in court or administrative proceedings; the grant of
19 summary judgment or directed verdict or dismissal for failure to
20 state a claim; plaintiff's inability to establish a prima facie
21 case; the novelty of the claims or unsettled nature of the legal
22 issues; and whether the plaintiff is represented by counsel. See
23 James W Moore, 10 Moore's Federal Practice, § 54.171[3][d] at 54-
24 297-303 (LexisNexis 3d ed 2007). The court should avoid "hindsight
25 logic," but "if the plaintiff insists on litigating in the face of
26 overwhelming precedent in favor of the defendant, fees may be
27 assessed against the plaintiff." Id at 54-299, 54-303.

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1 Mitchell filed her case not only lacking direct or
2 circumstantial evidence that her termination was improperly
3 motivated, but in full knowledge of the strength of Superior Court's
4 evidence that its motive was legitimate and non-discriminatory.
5 Prior to filing the complaint, plaintiff had access to three key
6 items of evidence.

7 The six-page non-punitive disciplinary letter dated August
8 4, 2003 documented dishonesty, insubordination, disrespectful or
9 discourteous conduct, misuse of position, failure to follow
10 policies, procedures or work rules or negligence in the performance
11 of duties and violations of the Tenets of the Code of Ethics for
12 court employees, specifically: personal integrity, professionalism
13 and safeguarding of confidential information (see Doc #70 at 8 and
14 Thompson Depo Ex 9, C04-3135 #35 Att #1 Ex B).

15 The Curiale report (C 04-3135 Doc #70 at 25) ran to
16 fourteen pages, was specific and detailed and "amounted to a
17 scathing review of Mitchell's performance in her position,"
18 documenting, inter alia, that Mitchell "managed by fear," used
19 demeaning language toward co-workers and subordinates, attempted to
20 undermine senior management and foster division and made improper
21 use of staff resources. Doc # 70 at 10-11.

22 The eleven-page, single-spaced termination letter dated
23 February 19, 2004 set forth Superior Court's grounds and factual
24 bases for its adverse action against Mitchell: dishonesty;
25 unacceptable performance; willful misconduct causing damage to
26 public property; disrespectful or discourteous conduct and sexual
27 harassment and/or discrimination toward a county officer or
28 official, another employee or a member of the public; and misuse of

1 position and violations of seven of the tenets of the code of ethics
2 for California court employees (Doc #70; Mitchell Depo Ex 17 at 1).

3 In the face of an exceptionally strong factual record
4 establishing the legitimate management reasons for Superior Court's
5 decision to dismiss her, Mitchell proceeded to retain counsel and
6 filed and served her complaint.

7 Next, Mitchell undertook a "wide ranging and costly"
8 discovery process that encompassed ten depositions (most of which
9 were of Superior Court's managers and employees) (Doc #77 at 6) and
10 emerged with no more evidence in her favor than she had begun with.
11 At that point, Mitchell had the option to dismiss the case, but
12 instead pressed on. "If a plaintiff's claim appears to be colorable
13 when filed, but subsequent events clearly demonstrate that the claim
14 is not defensible either on the law or the facts, fees may be
15 awarded to a prevailing defendant if the plaintiff does not timely
16 dismiss the litigation." Moore, 10 Moore's Federal Practice §
17 54.171[3][d] at 54-300. Voluntary dismissal allows a plaintiff to
18 avoid unduly burdening the defendant with legal expenses after
19 failing to muster the evidence needed to prove her case.

20 But Mitchell did not voluntarily dismiss the case after
21 discovery failed to reveal evidence that would enable her to make
22 out a prima facie case or to refute Superior Court's evidence of
23 legitimate non-discriminatory motive. Rather, she waited while
24 Superior Court incurred the substantial expense of assembling and
25 bringing a summary judgment motion. She opposed the motion —
26 albeit ineffectively — and the court granted summary judgment for
27 Superior Court on all of her claims.

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7 In her opposition, Mitchell does not contend that she
8 acted on advice of counsel. Given that the opposition was prepared
9 by counsel, however, the court deems it prudent to address this
10 potential argument.

16 || Moore, 10 Moore's Federal Practice § 54.171(3)(e) at 54-302.

11

1 The court has taken the occasion to review the ten most
2 recent cases in which Hopkins appeared as counsel of record in this
3 court (not including the instant cases). Of these ten cases, one is
4 currently open — C 05-5211 MMC. The outcomes in the other nine
5 cases are as follows: defense motion to dismiss granted, motion for
6 an award of attorney fees against plaintiff pending (C 05-0293
7 MHP)(order states: "The only issues raised by plaintiffs are issues
8 that were not raised in the complaint nor were they raised in the
9 arbitration proceedings despite ample opportunity to do so," Doc
10 #87); two summary judgments for the defense with costs awarded to
11 the defense (C 05-0317 SI Doc ##108, 126 and C 05-2820 WHA Doc #54);
12 partial summary judgment for the defense (C 06-3914 SI Doc #63)
13 followed by settlement (id Doc #66); and three settlements (C 04-
14 4978 JSW; C 05-1519 EMC; C 06-5522 PJH). In the only one of these
15 cases in which a settlement amount can be ascertained from the
16 public docket, Hopkins's client settled for a gross amount of \$3000
17 — a sum unlikely to have netted more than a pittance after fees and
18 costs were subtracted. C 04-4978 JSW Doc #35.

19 In just one case did Hopkins "prevail" at trial: the jury
20 found for the defendant on all claims but one, awarding Hopkins's
21 client one dollar on the remaining claim. C 04-3772 WDB Doc #124.
22 Notwithstanding the shaky foundation for declaring victory,
23 Hopkins's client unsuccessfully applied for attorney fees as a
24 "prevailing party." Id Doc #126-30. The application was denied
25 because of counsel's failure to keep "accurate, contemporaneous time
26 records." Id Doc #140.

27 The ten cases also demonstrate significant problems with
28 the quality of Hopkins's work on behalf of clients. Hopkins

1 received a minimum of ten notices for failure to comply with e-
2 filing requirements over a fifteen-month period from September 24,
3 2004, through December 5, 2005 (C 04-3772 WDB Doc ##3, 5, 8, 13, 23;
4 C 05-0293 MHP Doc #26; C 05-0317 SI Doc ##6, 14; C 05-0669 CW Doc
5 #5; C 05-1519 EMC Doc #21). Hopkins also: failed to respond to
6 requests for admission of material facts, thus enabling the
7 defendant to move for summary judgment on the ground that all
8 material facts were deemed admitted (C 04-04978 JSW Doc #13); failed
9 to oppose a motion to dismiss (id Doc #22, C 05-0317 SI Doc #18);
10 was sanctioned by the court for failing to respond to discovery (C
11 06-3914 SI Doc #32); was threatened with sanctions for failure to
12 file a settlement conference statement (C 06-5522 PJH Doc #17); and
13 prematurely appealed the district court's order of dismissal only to
14 have the appeal dismissed for lack of jurisdiction (C 05-0293 MHP
15 Doc #58). After failing to file a settlement conference statement
16 and failing to appear for a settlement conference, Hopkins, under
17 order from a magistrate judge, paid \$250 to charity to avoid a show-
18 cause hearing re: the imposition of further sanctions. C 05-5211
19 MMC Doc ##13, 14, 30. In just one case, Hopkins: failed to attend
20 a case management conference, failed to serve a defendant with
21 process, failed to comply with the court's discovery standing orders
22 and provided insufficient responses to discovery requests. C 06-
23 3914 SI Doc ## 15, 26-29, 33, 41.

24 In the instant consolidated cases, Hopkins failed to
25 produce requested documents during discovery (C 04-3135 Doc #29);
26 refused opposing counsel's request for additional time to file
27 documents (id Doc #73 Ex A at 2); failed to e-file on four occasions
28 (C 04-3135 Doc ##4, 5, 11, 20); submitted documents with numerous

1 typos, insufficient citations to evidence and annotations left over
2 from the drafting process (e g "FILL IN FACTS RE EEO COMPLAINT AND
3 CHARGE" (C 04-3135, Doc # 4 at 4 and passim); and, according to
4 Tolentino's replacement counsel, failed to hand over Tolentino's
5 complete files in an orderly or timely fashion after Hopkins's
6 representation of Tolentino ceased early on in the litigation (C 04-
7 3301 Doc # 51). And it bears repeating that in connection with the
8 instant motion, Hopkins: denied Superior Court's counsel the
9 courtesy of a modest extension of time to file the motion for fees
10 and the cost bills in these consolidated cases, thus needlessly
11 requiring Superior Court to spend even more on fees; failed to meet
12 and confer with Superior Court's counsel regarding attorney fees as
13 required by Local Rule 54-6; and failed timely to oppose the instant
14 fee motion, ultimately submitting a tardy and poorly-crafted
15 response.

16 In summary, Hopkins's track record, from the standpoint of
17 a prospective Title VII plaintiff, cannot reasonably give rise to
18 optimism about her chances of success in the litigation. Mitchell,
19 as a long-term manager in the courts, may be presumed to be more
20 aware than the average citizen that a specific attorney's competence
21 or skill often has a direct bearing on the outcomes he achieves for
22 his clients. It is therefore especially appropriate to hold
23 Mitchell, with her special knowledge of the attorney's role,
24 accountable for the actions of her attorney.

25 No matter what his or her level of skill, a lawyer is the
26 agent of her client and "a losing civil rights plaintiff must answer
27 for the conduct of her lawyer." Schutts v Nevada, 966 F Supp 1549,
28 1558 (DC Nev 1997). The Ninth Circuit does not appear to have

1 addressed this distinction, but a much-cited case from the Eleventh
2 Circuit (cited with approval by the Ninth Circuit as to a different
3 point in Miller v Los Angeles County Board of Education, 827 F2d
4 617, 621 (9th Cir 1987)) is in accord:

5 Like any other principal, a client may be bound by
6 the acts of his agent, acting within the scope of
7 his authority * * *. [T]he perception that
8 counsel was primarily at fault in filing or
9 maintaining a frivolous, groundless, or
10 unreasonable claim should play no role in the
11 decision whether to assess attorney's fees against
12 the plaintiff in a Title VII case.

13 Durrett v Jenkins Brickyard, Inc, 678 F2d 912, 915-16 (11th Cir
14 1982)(reversing district court's order refusing fee award to
15 defendant based on belief that plaintiff "bore less responsibility
16 for the fiasco than his lawyer.") A plaintiff thus obligated to pay
17 the defendant's attorney fees may find redress in a malpractice
18 action against her lawyer: "If the plaintiff's attorney's actions
19 were negligent, she can sue him for malpractice." Schutts, 966 F
20 Supp at 1558; "in [] cases * * * in which the plaintiff's counsel
21 may appear to be primarily culpable, the plaintiff may find relief
22 * * * in the form of a malpractice action"). Accordingly, it is
23 appropriate to make an award of fees against Mitchell personally.

24
25 D

26 Mitchell's opposition does not contend that the requested
27 award of fees would exceed her ability to pay. It also makes no
28 assertions, conversely, about Superior Court's ability to shoulder
the expenses of defending against Mitchell's suit without recouping
any fees from her. The court nonetheless must address the former
consideration in some manner because "a district court in cases

1 involving 42 USC § 1981, 1983 or Title VII should consider the
2 financial resources of the plaintiff in awarding fees to a
3 prevailing defendant" although "a district court should not refuse
4 to award attorney's fees to a prevailing defendant * * * solely on
5 the ground of the plaintiff's financial condition." Miller, 827 F2d
6 617, 621 & n 5. The court must consider the financial impact on
7 Superior Court as part of the balancing of equities discussed in II
8 A, supra.

9 In the absence of data from Mitchell, the court consulted
10 current employment listings on Superior Court's website. A listing
11 for "lead deputy court clerk," a position lower in rank than that
12 last held by Mitchell, advertised a monthly salary of \$4,136 to
13 \$5,169, which translates to an annual salary of \$49,632 to \$62,028.
14 <http://www.sanmateocourt.org/director.php?filename=./jobs/index.php>
15 (consulted December 13, 2007). Mitchell's qualifications may
16 therefore be presumed to place her earning capacity at or above this
17 salary range. In view of Mitchell's presumed earning capacity,
18 Superior Court's fee request is presumptively within Mitchell's
19 ability to pay.

20 Meanwhile, the court lacks specific information about the
21 impact of defense costs on Superior Court's fiscal situation. If
22 Mitchell had raised an argument in this regard in her opposition —
23 which she did not — Superior Court would have been prompted to
24 address it in reply. In the absence of specific information,
25 however, it is perhaps sufficient to note that Superior Court is a
26 public agency funded by tax revenues collected by the State of
27 California. Ultimately, the cost of defending against lawsuits such
28 as Mitchell's must be borne by the taxpayers.

IV

Following her termination from employment, Mitchell chose to retain counsel, initiate litigation, conduct extensive discovery and await summary judgment proceedings in full knowledge of the abundance of evidence against her claims and armed with little more than a near-certainty of failure.

Under these circumstances, it is not appropriate for Superior Court, a public entity entirely funded by taxpayer dollars, to be saddled with the substantial costs of defending this frivolous action. For the reasons stated herein, Superior Court's motion for an award of \$99,934.75 is GRANTED.

Mitchell shall also pay Superior Court's costs as set forth in its cost bill (Doc #84) in full.

Mitchell's request for leave to submit supplemental late briefing is DENIED as untimely, futile and moot.

Mitchell's request to stay the motion for attorney fees pending the resolution of her appeal from the court's order on the merits is DENIED.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge